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5 UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7 OAKLAND DIVISION
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10 DARRYL CARTER,
11 Plaintiff,

12 vs.

13 UNITED STATES DEPARTMENT OF
14 JUSTICE,
15 Defendant.

Case No: C 18-02455 SBA

ORDER DISMISSING ACTION

16 In March 2018, pro se plaintiff Darryl Carter (“Plaintiff”) filed the instant action in
17 the Santa Clara County Superior Court against Defendant United States Department of
18 Justice (“Defendant”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.
19 Dkt. 1-1. Defendant removed the action to this Court. Dkt. 1. As of the filing of its
20 Answer on May 2, 2018, Defendant agreed to produce documents responsive to Plaintiff’s
21 FOIA request. Dkt. 7 ¶ 9.

22 The procedural background of the action is set forth more fully in the Court’s prior
23 orders. See Dkt. 20, 26, 35, 45, 55. In pertinent part, on July 6, 2016, Defendant first
24 responded to Plaintiff’s FOIA request and produced 30 pages of documents in full along
25 with a cover letter (“Response”). Defendant sent the Response to Plaintiff’s mail and email
26 addresses of record; however, Plaintiff claims not to have received the same.¹ On July 26,

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28 ¹ Until recently, Plaintiff’s mailing address of record was a Post Office Box in Palo
Alto, California. According to Plaintiff, he ceased using the address in February 2018. He
nonetheless failed to file a notice of address change, as required by Civil Local Rule 3-11.

1 2018, Defendant sent a second copy of the Response to Plaintiff's email address. Again,
2 Plaintiff claims not to have received the same, despite the fact that he continues to send and
3 receive other emails from that address. On July 28, 2018, Defendant inquired whether
4 Plaintiff would like a third copy of the Response, and if so, where it should be sent.
5 Plaintiff did not respond to that inquiry. On August 3, 2018, Defendant thus sent a third
6 copy of the Response to Plaintiff's email address. Defendant requested and received a
7 delivery confirmation for the August 3rd email. Nevertheless, Plaintiff has not
8 acknowledged receipt of the same.

9 Pursuant to the Case Management Scheduling Order, an initial Case Management
10 Conference ("CMC") was set for August 2, 2018 at 2:45 p.m. Dkt. 15. The Court called
11 the case for an initial CMC at the date and time stated. Defendant appeared; Plaintiff did
12 not. On August 3, 2018, the Court issued an Order to Show Cause ("OSC"), directing
13 Plaintiff to show cause in writing why the action should not be dismissed for his failure to
14 appear at the CMC. Dkt. 35. The Court warned that the failure to comply with the order,
15 including the failure to timely file a written response, would be grounds to dismiss the
16 action without further notice. To date, Plaintiff has not responded to the OSC.

17 Instead, on August 4, 2018, he filed a motion for preliminary injunction. Dkt. 36.
18 By his motion, Plaintiff sought the immediate release of all documents responsive to his
19 FOIA request "via electronic means i.e., email." Dkt. 36-2. Plaintiff expressly stated that
20 he is aware of this Court's meet-and-confer requirement but chose not comply with the
21 same, arguing that, "with all due respect to whatever aims such order seeks to achieve, said
22 order is certainly more harmful than helpful given the facts of this case." Dkt. 36 at 15.²

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25 ² Plaintiff has twice moved for a preliminary injunction. Dkt. 16, 36. The first such
26 motion, filed June 27, 2018, was later withdrawn. Dkt. 19, 20. Nevertheless, Plaintiff
27 appealed the order granting his motion to withdraw. See Case No. 18-16314. On August
28 23, 2018, the Ninth Circuit dismissed that appeal for lack of subject matter jurisdiction,
noting that "the order challenged in the appeal is not final or appealable." Dkt. 63. As
discussed in greater detail above, the Court denied Plaintiff's second motion due to his
failure and refusal to comply with the Court's meet-and-confer requirement. Dkt. 45.
Plaintiff has appealed that order as well. See Case No. 18-16521.

1 On August 8, 2018, the Court issued an order denying Plaintiff's motion for a
2 preliminary injunction due to his failure and refusal to meet and confer ("8/8 Order").
3 Dkt. 45.³ The Court explained that the meet-and-confer requirement is essential to ensure
4 that there is, in fact, a dispute requiring judicial intervention, and to conserve the limited
5 time and resources of the Court and the parties by obviating the filing of unnecessary
6 motions. The Court directed the parties to meet and confer regarding the sufficiency of the
7 Response and provided precise instructions to facilitate that process. Specifically, Plaintiff
8 was to file a statement providing a current mail and/or email address where he would like
9 Defendant to deliver the Response. Defendant was then to deliver another copy of the
10 Response to the mail and/or email address provided. Thereafter, the parties were to meet
11 and confer via telephone, and Plaintiff was to file a statement certifying his compliance
12 with the 8/8 Order. The Court warned Plaintiff that the "**failure to FULLY comply**" with
13 the order, and each directive therein, would result in the dismissal of the action without
14 further notice. Id.

15 As set forth more fully in the Court's order dated August 15, 2018 ("8/15 Order"),
16 Plaintiff did not fully or timely comply with the 8/8 Order. Dkt. 55. He belatedly provided
17 Defendant a current mailing address in the Philippines, however. Defendant promptly sent
18 a fourth copy of the Response to Plaintiff's address in the Philippines via FedEx using the
19 highest delivery option for the earliest possible delivery date. Defendant also sent another
20 copy of the Response to Plaintiff's email address. Defendant requested and received a
21 delivery confirmation for that email. Having been apprised of these developments, the
22 Court ordered Plaintiff to participate in the meet and confer, as previously ordered, by
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24 ³ The Court's Standing Orders for Civil Cases requires the parties to meet and confer
25 prior to filing any motion or request. Standing Order No. 4 provides:

26 **Meet and Confer Requirement.** All parties *shall* meet and confer before
27 filing any motion or other non-stipulated request. Any motion or request
28 shall include a certification, which may be submitted separately or included
in the body of the document, that the parties have complied with the meet
and confer requirement. The Court may disregard and/or strike any papers
submitted that do not comply with this rule.

1 August 17, 2018. The Court acknowledged that Plaintiff had not yet received the FedEx
2 package, but noted that he had also been sent the Response by email. The Court thus
3 ordered Plaintiff to “cooperate with Defendant’s meet and confer efforts and make himself
4 available at the time(s) specified.” Id. Again, the Court warned that the “**failure to**
5 **FULLY comply**” with the order, including the failure to meet and confer as directed,
6 would result in the dismissal of the action without further notice. Id.

7 On August 17, 2018, Plaintiff filed a Notice of Meet and Confer Had on 08/17/18 @
8 4:30 P.M. PT, wherein he states that the FedEx package was not delivered as of the time of
9 the parties’ call. Dkt. 60. Plaintiff refused to meet and confer substantively prior to his
10 receipt of the FedEx package. As a result, the parties ended the call with the understanding
11 that further meet and confer discussions would take place on or about August 20, 2018,
12 when the FedEx package was scheduled for delivery. Although Defendant attempted to
13 discuss other matters, “Plaintiff advised that such as discussion was not in scope as the
14 purpose of this so-called ‘meet and confer’ was to discuss the FOIA issues, irreparable
15 harm, and subsequent damages related thereto.” Id. “The call was terminated at that time.”
16 Id. According to Plaintiff, “it is overwhelmingly obvious that this is a sham at best and
17 defendant is only interested in avoiding the facts, issues and in conjunction, with the district
18 court, attempting to stave off the, herein, specified appeals case, i.e., protecting themselves
19 at plaintiff’s expense.” Id.

20 On August 20, 2018, Defendant filed a notice confirming that the parties spoke by
21 phone on August 17, and that the call was terminated because Plaintiff had not received the
22 FedEx package. Dkt 61. The notice further provides that the FedEx package is now
23 scheduled for delivery on August 25, 2018. Id. Thereafter, defendant filed a supplemental
24 notice. Dkt. 62. According to the supplemental notice, FedEx has informed Defendant that
25 “*Plaintiff requested the change in delivery of that package from August 20 to August 25,*
26 *2018!*” Id. (emphasis in original). The supplemental notice adds that, in the meantime,
27 Plaintiff has filed yet another “emergency motion” in the Ninth Circuit seeking a
28 preliminary injunction. Defendant asks that the Court take “appropriate action,” including

1 dismissal of the action and/or certification that Plaintiff's appeals are frivolous. Id.⁴
2 Finally, on August 28, 2018, Defendant filed a status report, advising that the FedEx
3 package has now been delivered. Dkt. 64. Subsequent to delivery, Defendant attempted to
4 meet and confer by telephone, but received an automated message indicating that calls
5 cannot be completed to the number provided by Plaintiff. Id. By email, Plaintiff
6 acknowledged receipt of the FedEx package, but refused to meet and confer regarding the
7 sufficiency of the Response, which he describes as "worthless garbage." Id.

8 Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an
9 action, sua sponte, for a plaintiff's failure to prosecute or comply with the rules of civil
10 procedure or a court order. Hells Canyon Pres. Council v. U.S. Forest Serv., 403 F.3d 683,
11 689 (9th Cir. 2005); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). In deciding
12 whether to dismiss an action under Rule 41(b), the Court must weigh the following five
13 factors: (1) the public's interest in expeditious resolution of litigation; (2) the need to
14 manage its own docket; (3) the risk of prejudice to the defendants; (4) the public policy
15 favoring disposition of cases on their merits; and (5) the availability of less drastic
16 alternatives. Ferdik, 963 F.2d at 1260-61.

17 As Plaintiff was previously advised, the Court is troubled by his conduct in this
18 action, and recent events have only exacerbated these concerns. Plaintiff has failed to:
19 (1) comply with the Court's meet-and-confer requirement; (2) provide current contact
20 information; (3) appear for a scheduled case management conference; (4) respond to the
21 Court's order to show cause; or (5) fully comply with the 8/8 and 8/15 Orders.

22 Although Plaintiff provided an email address of record and has indisputably received
23 emails at this address, he purports not to have received (or fails to acknowledge receipt of)
24 Defendant's *four* emails transmitting the Response. This is implausible, particularly in
25 light of the delivery confirmations requested and received by Defendant. Following the

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27 ⁴ The Court notes that it certified Plaintiff's initial appeal—Case No. 18-16314—as
28 frivolous in its order denying Plaintiff's motion to proceed in forma pauperis on appeal.
Dkt. 26. Plaintiff has not moved to proceed in forma pauperis on his subsequent appeal—
Case No. 18-16521.

1 parties' unsuccessful telephonic meet and confer session on August 17, 2018, Defendant
2 asked Plaintiff to confirm whether he received the emails transmitting the Response and
3 could open the attachments thereto. Plaintiff did not respond to those questions, but rather,
4 took the untenable position that he: (1) will engage in no further meet and confer
5 discussions until he receives the FedEx package, which *he* rescheduled for a *later* delivery;
6 and (2) intends to "move forward with expediting [his] preliminary injunction appeal."
7 Dkt. 61-1, Ex. A. Finally, even after delivery of the FedEx package, Plaintiff has refused to
8 meet and confer with Defendant regarding the sufficiency of the Response, in contravention
9 of the 8/8 and 8/15 Orders.

10 Plaintiff continues to litigate the action in this Court and the Ninth Circuit; however,
11 his conduct appears designed, not to facilitate a speedy resolution, but rather to impede it.
12 Given Plaintiff's implausible denials regarding receipt of the Response sent to his email
13 address of record, coupled with his egregious behavior in delaying delivery of the FedEx
14 package, the Court is persuaded that Plaintiff has deliberately obstructed the administration
15 of justice in this action. Although the purported goal of the litigation is to obtain
16 documents responsive to his FOIA request, Plaintiff has continually thwarted the successful
17 transmission of the Response (and failed to acknowledge receipt of the same), which
18 Defendant first attempted to deliver on July 6, 2018, and ultimately delivered on four
19 separate occasions. Moreover, even after receipt of the FedEx package, Plaintiff has
20 refused to meet and confer regarding the sufficiency of the Response, as ordered by the
21 Court. This constitutes a waste of judicial resources, as well as those of Defendant.

22 In view of the foregoing, the Court finds that the factors set forth above support
23 dismissal of this action. The public's interest in the expeditious resolution of litigation and
24 the need to manage the Court's docket weigh heavily in favor of dismissal. Plaintiff's
25 numerous filings and obstructionist tactics have taken up an inordinate amount of the
26 Court's time, particularly when measured against their general lack of merit. Indeed,
27 Defendant agreed to produce and repeatedly transmitted the documents responsive to
28 Plaintiff's FOIA request. Defendant and the Court have gone to extraordinary lengths to

1 ensure delivery of the Response, despite the implausibility of Plaintiff's sustained denial of
2 receipt. Despite all of those efforts, Plaintiff has refused to meet and confer regarding the
3 sufficiency of the Response, even after delivery of the FedEx package.

4 Prejudice to Defendant also supports dismissal. See Von Poppenheim v. Portland
5 Boxing & Wrestling Comm'n, 442 F.2d 1047, 1054 (9th Cir. 1971) ("Somewhere along the
6 line, the rights of the defendants to be free from costly and harassing litigation must be
7 considered."). Notwithstanding its production of the Response, Defendant has had to
8 continue responding to Plaintiff's frivolous filings and to contend with his obstructionist
9 conduct, including the failure to provide current and serviceable contact information and
10 the refusal to meet and confer.

11 The public policy favoring a disposition on the merits necessarily weights against
12 dismissal. However, this factor alone does not outweigh the other factors. See Ferdik, 963
13 F.2d at 1263 (holding that, even if two factors weighed against dismissal, "they would not
14 outweigh the other three factors that strongly support dismissal") (citing Malone v. United
15 States, 833 F.2d 128, 133 n.2 (9th Cir. 1987) (holding that four factors heavily supporting
16 dismissal outweighed one against dismissal)). Moreover, Plaintiff's conduct, including his
17 refusal to acknowledge receipt of the Response or to meet and confer regarding its
18 sufficiency, have impeded the Court's ability to dispose of the action otherwise.

19 Finally, with respect to the availability of less drastic alternatives, the Court has
20 already employed such options, to no avail. The Court previously issued an order to show
21 cause why the action should not be dismissed, but Plaintiff failed to respond to the same.
22 The Court has issued detailed orders in an attempt to ensure Plaintiff's receipt of the
23 Response and facilitate the meet and confer process. Plaintiff has failed to comply with
24 those orders. The Court has, on at least three occasions, warned Plaintiff that the failure to
25 comply with its orders would result in the dismissal of the action without further notice.
26 Plaintiff has not taken heed of these warnings. Accordingly,

27 IT IS HEREBY ORDERED THAT the instant action be DISMISSED with
28 prejudice. The Court certifies that any appeal taken from this order is not taken in good

1 faith within the meaning of 28 U.S.C. § 1915(a)(3). Plaintiff may file a motion to proceed
2 IFP on appeal before the Ninth Circuit. See Fed. R. App. P. 24(a)(5). The Clerk shall close
3 the file and terminate any pending matters.

4 IT IS SO ORDERED.

5 Dated: 08/31/2018


SAUNDRA BROWN ARMSTRONG
Senior United States District Judge